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14

15   UNITED STATES DISTRICT COURT

16   NORTHERN DISTRICT OF CALIFORNIA

17   SAN JOSE DIVISION

18 CISCO SYSTEMS, INC.,   Case No. 5:14-cv-05344-BLF (NC)

19   Plaintiff,   **ARISTA'S REPLY BRIEF RE ANALYTIC DISSECTION**

20   v.   Dept.:   Courtroom 3 - 5th Floor
                                            Judge: Hon. Beth Labson Freeman
21 ARISTA NETWORKS, INC.,

22   Defendant.   Date Filed: December 5, 2014

23   Trial Date: November 21, 2016

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1   Cisco's dissection brief concedes that many aspects of its asserted interfaces are

2 unprotectable and that *scenes a faire* evidence must be presented at trial. To the extent Cisco

3 disputes that other asserted interface elements are unprotectable, its arguments lack merit and it

4 offers no evidence to support them. The Court should instruct the jury on the unprotectable

5 elements of Cisco's asserted works as explained below.

6 **I.   Undisputed issues.**

7   **A.   The many interface elements that Cisco concedes are unprotectable should be
            identified for the jury.**

8   Cisco claims that the many parts of its interfaces that undisputedly do not qualify for

9 copyright protection "should be disregarded." *E.g.*, Cisco 11/8 Dissection Br. (ECF 619) ("Cisco

10 Br.") at 11:23. That is not the law. The interface features that Cisco admits are part of the public

11 domain are exactly the sort of material the Court should identify to prevent an erroneous

12 infringement verdict. *See* Arista 11/8 Dissection Br. (ECF 617-4) ("Arista Br.") at 8. Cisco

13 offers no authority to the contrary. In fact, without careful instruction on these matters, the Court

14 risks a jury verdict of infringement grounded in similarities of unprotectable elements. Especially

15 given the unwieldy scope of this case and the limited time for trial, Arista should not be forced to

16 waste trial time explaining features of an IOS interface that the parties and the Court agree are

17 unprotectable, but that will be unfamiliar and confusing to the lay jury. The risk is especially

18 severe in this case in light of Cisco's theories grounded in similarities of the "look and feel" of

19 the programs, and incessant accusations of improper and "slavish" copying. *See Harper House,*

20 *Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207 (9th Cir. 1989) (reversing jury verdict because of

21 inadequate instructions on unprotectable elements; explaining "obvious risk of an improper

22 verdict" given "the negative connotations to 'copying'").

23   Accordingly, the Court should instruct the jury that the following elements Arista has

24 identified for analytic dissection, and that Cisco concedes it does not own, are unprotectable: (1)

25 "individual" or "isolated words in Cisco's multiword command expressions"; (2) "'portions' of

26 multiword command expressions dictated by functional demands"; (3) "the 'idea' of a hierarchy";

27 (4) "'the idea' of grouping commands by their first word"; (5) "individual mode indicators and

28 prompts"; (6) "the 'idea of making certain commands available only in certain modes"; (7) "the

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1   'idea of an interactive help system'"; (8) "the 'idea of using a text-based user interface' rather

2   than a graphical interface"; (9) "the idea of using multiword commands to manage or configure a

3   device"; and (10) "the function of any asserted feature (as opposed to Cisco's expression)."

4   Cisco Br. at 5:9–15 (Cisco "does not claim protection" over these elements); *id.* at 8, 14:18-20.

5   In addition, Cisco has now identified the following additional interface elements that it

6   concedes are unprotectable, and the Court should identify these elements to the jury as well: (1)

7   "single word commands"; (2) "use of '?' to call up help descriptions"; (3) "command prefixes

8   that the user interface autocompletes"; (4) "tab completion"; and (5) "minimum syntactic length"

9   (a concept Cisco does not explain). *Id.* at 5.

10   As for the remaining dissection issues, Cisco blithely assures the Court that because Cisco

11   has conceded the above-listed elements of its interface are unprotectable, "[t]he Court may

12   therefore be confident that the elements that Cisco asserts *are all protectable*." Cisco Br. at 5:16–

13   17 (emphasis added). In fact, as explained below, many other aspects of what Cisco asserts here

14   as the protectable elements of its works are also unprotectable.

15   **B.   Both parties agree that *scenes a faire* must be presented at trial.**

16   Cisco's brief makes clear that neither party is asking the Court to decide *scenes a faire*

17   issues now on a paper record, and that Cisco agrees with Arista (albeit for the wrong reasons[1])

18   that *scenes a faire* evidence must be presented at trial. It bears noting, however, that Cisco is

19   wrong to claim that Arista has not presented evidence of external industry constraints. *See* Cisco

20   Br. at 7–8. In fact, Arista has offered extensive evidence of the external industry constraints on

21   CLI language, and Cisco offers nothing in response except conclusory contentions that Cisco had

22   "innumerable" choices, ignoring the highly functional nature of the CLI.[2] Cisco would have the

23   Court believe that CLI commands can be "any random set of words or characters," *see* Cisco Br.

24   at 6:5, but the evidence at trial will prove that Cisco's real choices were highly constrained.

25   _____

26   [1] As Arista has already explained, *scenes a faire* is not an "affirmative defense" under Ninth
      Circuit law, but part of the core infringement analysis that the jury must conduct with appropriate
      guidance from the Court. *See* Arista (ECF 455) at 3–4.

27   [2] For example, Arista has offered extensive evidence from Dr. Black that the command words at

28   issue were chosen from a limited set of technical terminology that would actually make sense in
      the networking industry context, from pre-existing sources not original to Cisco.

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II.   Cisco's arguments that the disputed CLI elements are protectable lack merit.

    A.   The jury should be instructed that Cisco's use of standards-based terms and conventional industry terminology is not protectable.

Cisco does not dispute that its commands are made up almost entirely of industry standard terms which describe functionality and features drawn directly from industry standard documents. Identifying these terms as unprotectable is essential for the jury to assess whether the asserted similarities are original and creative enough to support an infringement verdict, to understand the context for *scenes a faire*, and to accurately assess the amount of expressive content at issue for purposes of fair use.[3] Without such instruction, lay jurors might easily be misled into believing that Cisco coined the arcane acronyms and terminology of networking, when in fact those terms were pre-existing, commonly used labels for features that the asserted CLI commands relate to.

Consider the asserted command "area nssa." Both of these terms come from the standardized network routing concept known as OSPF or "open shortest path first." The IETF published RFC 1587 entitled "The OSPF NSSA Option," which describes a type of OSPF "area" known as a "not-so-stubby area" or "nssa." Ex. A (RFC 1587).[4] Cisco can take no credit for these terms. The industry had already labeled this type of "area" an "nssa" in a published standard. And every Ethernet switch vendor—not just Cisco—must be able to use these terms from the standard in CLI commands directed to this feature. Cisco may argue, if it wishes, that the command "area nssa" is protectable for other reasons, but the jury should be instructed that Cisco's use of the pre-existing terminology "area" and "nssa," by itself, is *not* protectable, any more than the phrase "counsel of record" would be protectable for a company that reports court decisions. *See Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 674, 682–84 (2d Cir. 1998); Arista 11/8 Dissection Br. at 4–5.

Or consider the command "show IPv6 OSPF interface." Arista has submitted unrebutted evidence that CLI commands in the form "show [parameter]" to cause the system to display a

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[3] Since Cisco concedes that it "does not seek protection for any isolated word in its multiword command expressions" (Cisco Br. at 7), or for any "individual 'words'" or "'portion' of a multiword command" (*id.* at 8), the only issue is whether the Court should specifically identify these unoriginal terms.

[4] Citations to "Ex. __" refer to the accompanying Declaration of Audrey Hadlock.

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1   parameter's value were a well-known formulation that Cisco borrowed from older systems.

2   "IPv6" refers to version 6 of the internet protocol, standardized by the internet community, and is

3   an acronym used in the protocol itself and across the networking industry. IETF RFC 2740

4   defines an "interface" as follows: "In OSPF for IPv6, an interface connects a router to a link." Ex.

5   B (RFC 2740) at 13. In other words, the concept of an IPv6 OSPF interface is part of the bread

6   and butter of networking, and Cisco used standard, pre-existing terminology to describe it.

7   For both of these examples, the RFCs were authored by committees of engineers not

8   affiliated with Cisco. Cisco may argue that no networking company was *required* to use these

9   terms, or use them in the order Cisco used them, but the jury should also understand that these

10   standard terms predated Cisco and were common throughout the networking industry, and that

11   Cisco's decision to use standard terminology, by itself, is not creative, original, or entitled to

12   protection under copyright law. This aspect of dissection is critical for the tasks the jury must

13   perform, including evaluating originality, scenes a faire, and fair use. Just as in *Apple v.*

14   *Microsoft*, this Court must identify the standard elements that are *not* protectable within the

15   asserted expression, so that the jury can properly focus its decision on what remains. *Apple*

16   *Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994).

17   Cisco is also wrong to claim that "there is no evidence that Cisco copied any of the

18   asserted command expressions from any other source, or that they are 'preexisting' facts." *See*

19   Cisco Br. at 6. For example, Arista's expert and other evidence show that large portions of the

20   asserted CLI consist of preexisting industry terminology. *See* Arista Br. at 2–5. Cisco's expert

21   has not disputed this fact. On the contrary, as one would expect, Cisco instructed its engineers to

22   use pre-existing standardized terms whenever possible to refer to an industry-standard function.

23   Moreover, the existence of terminology in preexisting standards, which Arista's expert Dr. Black

24   has chronicled in detail on a command-by-command basis (*see, e.g,* Black Am. App. K), is not

25   reasonably disputable. Thus, Arista expects that there will be few if any factual disputes about

26   particular terms. However, if such specific disputes exist, they can be resolved later, after the

27   Court hears evidence. At this stage, the Court need only decide the main issue—that Cisco's use

28   of preexisting, standard networking terminology, by itself, is not protectable.

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1   Cisco relies heavily on *CDN Inc. v. Kapes*, 197 F.3d 1256, 1260 (9th Cir. 1999), to

2   discourage the Court from conducting dissection with respect to these industry standard terms,

3   but *CDN* does not apply. There the issue was the copyrightability of pricing estimates formulated

4   after expert analysis and assessment of various facts, and the result turned on the Court's

5   conclusion that the copyright holder followed an original process in arriving at its own appraisal

6   of a coin's value. Arista's argument here focuses on Cisco's decision to use standard, preexisting

7   industry terminology. *CDN* in no way suggests that such use is protected. And in any event,

8   "[t]he Supreme Court has held unequivocally that the Copyright Act protects only the expressive

9   aspects of a copyrighted work, and ***not*** the 'fruit of the [author's] labor.'" *VMG Salsoul, LLC v.*

10 *Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016) (emphasis in original; quoting *Feist Publ'ns, Inc. v.*

11 *Rural Tel. Serv. Co.*, 499 U.S. 340, 349–54 (1991); applying *de minimis* rule). This is an

12 essential rule to ensure that public domain material is not lost for 100 years or more.

13   Although the "amount of creative input by the author required to meet the originality

14 standard is low, it is not negligible," and more than "merely trivial" creativity is necessary.[5]

15 *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003); *Matthew Bender*, 158 F.3d at 682. Cisco

16 argues that the creativity assessment begins and ends with the question of whether another set of

17 "words or characters" could have been used.[6] Cisco Br. at 6 (citing Almeroth Rpt. ¶ 101). But in

18 other contexts, even Cisco concedes that such a test proves too much. Cisco concedes, for

19 example, that mode names alone and single word commands are not protectable. Cisco Br. at

20 1:20, 5:11. Using a pre-existing industry label to describe something fails the low bar for

21 originality, and the jury must understand that limitation to evaluate fairly whether the rest of what

22 Cisco asserts here qualifies as original creative expression, and to preserve Arista's right to

23 implement the same basic industry functions that Cisco's commands invoke. *See Bikram's Yoga*

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[5] Cisco claims that the Court "need not" analyze its individual commands for creativity and originality, but can simply rely on Cisco's purportedly "undisputed creative process." Cisco Br. at 7:8-9. Cisco is wrong. Arista ***does*** dispute the creativity of Cisco's process, and disputes that there even was such a process for every asserted command. Moreover, so long as Cisco asserts that each command is individually protectable, each command must be individually addressed.

[6] The Court need not accept Cisco's illogical and conclusory testimony in conducting its analytic dissection. *See Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003) (affirming rejection of "abstract" expert opinion); *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, No. 4:08-cv-03181, 2010 WL 4065465, at *13 (S.D. Tex. Oct. 9, 2010) (rejecting originality opinions).

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College of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1040–41 (9th Cir. 2015).

B.   Cisco's arguments against applying the words and short phrases doctrine to its individual commands lack merit.

Cisco's arguments on the words and short phrases doctrine are also wrong. First, the law does not support Cisco's odd claim that the "words and short phrases" doctrine only applies to phrases "such as names, titles, and slogans" and thus cannot apply to non-advertising text like Cisco's individual commands asserted here. *See* Cisco Br. at 10:19-21. In fact, as Arista has explained, the leading Ninth Circuit decision in *Narell v. Freeman* applied the doctrine to phrases taken from a non-fiction book and used in a novel, and the Federal Circuit has applied the rule to phrases in a digitized set of CPR instructions.[7] *See* Arista Br. at 6; *see also* 37 C.F.R. § 202.1(a) (applying rule to "mere listing of ingredients or contents").[8] Cisco's own authorities also consider and apply the rule in the context of books and religious texts. *See infra* note 10.

Second, although Arista's "short phrases" argument expressly targets only the ***individual*** Cisco commands[9] (which Cisco claims are individually protectable), Cisco's response largely relies on cases where plaintiffs claimed creativity in the overall selection or arrangement of short phrases and other elements to defeat the words and short phrases rule. Cisco Br. at 11. Cisco's argument misses the point, and its authorities support Arista's position.[10] Cisco also cites *J. Racenstein & Co. v. Wallace*, No. 96 Civ. 9222(TPG), 1999 WL 632853 (S.D.N.Y. Aug. 19, 1999), for the basic rule that "a short phrase may command copyright protection if it exhibits sufficient creativity." *Id.* at *2 (quoting Nimmer on Copyright § 2.01[B]). But the threshold for

---

[7] The individual commands asserted here are also essentially names or titles given to the functions invoked by entering them at a prompt. *See* Arista Brief at 18–19. Thus, the individual commands would be unprotectable short phrases even under Cisco's mistaken view of the law.

[8] *See also* U.S. Copyright Office Circular 34, at http://www.copyright.gov/circs/circ34.pdf (unprotectable words and short phrases including "listing of ingredients, as in recipes, labels, or formulas"; "Names, titles, and other short phrases do not meet" copyrightability requirements.").

[9] Arista refutes Cisco's claims about its ***overall selection*** of commands separately below.

[10] For example, Cisco cites *Compaq v. Ergonome*, 137 F. Supp. 2d 768, 772 (S.D. Tex. 2001), where the plaintiff asserted the "arrangement and selection of the words and pictures [in parts of a book] as a coherent whole"; *Soc'y of Holy Transfiguration Monastery v. Gregory*, 689 F.3d 29, 52 (1st Cir. 2012), where defendant "fail[ed] to identify . . . the alleged short phrases" he claimed were unprotectable in a translation of religious texts; and *Ventures Educ Sy. Corp. v. Prof'l Dev. Assocs.*, No. 07 Civ. 223(WHP), 2008 WL 3166667 at *3 (S.D.N.Y. July 31, 2008), which involved contracts and found phrases could acquire meaning from their overall context as arranged within a work.

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1　determining whether a phrase contains any "appreciable level of creativity" varies inversely with

2　its length: "The smaller the effort (e.g. two words) the greater must be the degree of creativity in

3　order to claim copyright protection." *Id.* (quoting Nimmer). Thus, the phrase "safety core" (used

4　to describe a rope product) was "at most an insubstantial rearrangement of only two words

5　borrowed from other sources," and was therefore unprotectable. *Id.* Cisco's individual

6　commands are unprotectable under this rule. They consist of only a few words, taken from other

7　industry sources, and a high degree of creativity would be necessary to warrant any ***individual***

8　copyright protection for such "insubstantial arrangements" of technical terms. Cisco's *ipse dixit*

9　cannot make such "trivial or insignificant" phrases creative enough to qualify for protection. *Id.*;

10　*CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1519–20 (1st Cir. 1996).

11　　　　　**C.　　Cisco does not claim to own individual command syntax, which is
　　　　　　　　　unprotectable.**

12

13　　　　　Cisco concedes that it "does not claim protection in so-called individual 'command

　　syntax.'" Cisco Br. at 11:18-22. But this does not mean Arista's syntax "objection should be

14

　　disregarded." *Contra id.* at 11:22-23. Instead, the command syntax that Arista has identified as

15

　　unprotectable (*see* Arista Br. at 7–8) and that Cisco has conceded must be identified for the jury.

16

17　　　　　**D.　　Cisco's incomplete and inoperable asserted commands are unprotectable and
　　　　　　　　　Arista has not "admitted" otherwise.**

18　　　　　Cisco claims Arista cannot challenge the incomplete and inoperable command fragments

19　that Cisco asserts here, because Arista admitted that it used those commands. Cisco Br. at 11–12.

20　In fact, Arista's Answer to Cisco's Second Amended Complaint correctly ***denies*** that Arista uses

21　the disputed commands. Answer to SAC (ECF 65) at ¶ 53. Thus, Arista's initial mistaken

22　admission of using them is no longer binding. *See Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th

23　Cir. 1996). "When a pleading is amended or withdrawn, the superseded portion ceases to be a

24　conclusive judicial admission." *Id*. Likewise, the discovery responses Cisco claims "admit[] to

25　implementing the commands in EOS" do not do so. *See* Cisco Br. at 12:3 & Ex. 16 (Rog. 9)

26　(identifying at a high level Arista employees with knowledge of command creation, development,

27　and/or implementation for each accused command); Cisco Br. Ex. 17 (Rog. 26). In fact, Arista

28　explicitly objected to discovery because "many of the accused 'command expressions' are not

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1   syntactically valid and/or complete EOS CLI commands." *Id.* at 7:3–4.

2   **E.**   **Cisco does not dispute that its selections and arrangements of commands were created for this litigation, and they remain unprotectable.**

3   Cisco does not deny that its asserted selections of commands come from multiple works

4   and are only a portion of the commands in each of those works. Instead of disputing those facts,

5   Cisco argues that whether its asserted arrangements of commands "are taken from multiple

6   works" or "comprise a small fraction of the expression in each work" is irrelevant and has no

7   "bearing on analytic dissection." Cisco Br. at 12:11–13. Cisco is wrong. Because Cisco has

8   claimed protection in its overall selection and arrangements of commands—not simply the

9   individual commands themselves—the Court's task on dissection includes determining whether

10   those selections and arrangements are protectable creative arrangements that appear in Cisco's

11   actual works, or unprotectable selections assembled only for litigation. Cisco seems to claim that

12   its arrangements are protectable because Cisco identified them here as its protectable elements

13   (*see* Cisco Br. at 12–13), but that circular logic cannot support copyright protection. For a

14   compilation of unprotectable elements to receive copyright protection under Ninth Circuit law,

15   there must be some "creative spark" in the arrangement and selection of those elements ***within

16   the work itself***—not in an arrangement created for litigation. *See Satava*, 323 F.3d at 811.

17   Far from identifying any creative spark in its asserted arrangements of commands, Cisco

18   admits in so many words that the only creative principle behind its asserted selection or

19   arrangement of commands in this case is one of selecting and litigating whatever it believes

20   Arista copied. As Cisco concedes, "the common characteristic that binds Cisco's 500+

21   multiword command expressions . . . is Arista's own decision to copy portions of Cisco's user

22   interface pertaining to Gigabit Ethernet switching products." Cisco Br. at 12:22–25. Cisco's

23   supposedly "extensive" evidence of creativity of these arrangements is unavailing. *Id.* at 12:14-

24   20. The only creativity Cisco's Dr. Almeroth identifies is essentially "[c]hoosing the words and

25   the arrangement and the organization of those words." Almeroth Rpt. (ECF 626-1) ¶ 101. This

26   fails to support claims of creativity in the selection of commands actually asserted here, however.

27   Similarly, Cisco argues that it is "irrelevant to analytic dissection" that its asserted

28   commands "make up a 'small fraction' of any particular 'work'"—but it doesn't dispute that its

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1   alleged "selections" here have no real existence outside this litigation. Cisco Br. at 13:7-8. Cisco

2   argues that copying of even a small portion of a work can potentially be infringing, but this is

3   beside the point. For purposes of analytic dissection, the reason Cisco's subsets of commands

4   aren't protectable *as selections or arrangements* is that Cisco never selected or arranged them in

5   the form asserted here until this litigation—not that the selections are too "small" to be

6   protectable (although Arista will also prove at trial that they are too insignificant a part of Cisco's

7   overall works for copying them to amount to infringement). None of Cisco's cited authorities are

8   relevant to the actual questions before the Court. Arista is not seeking here to "avoid liability" by

9   "pointing out the dissimilarities between the protected work and the infringing copy" or "showing

10   how much of [its] work [it] did not pirate." *See* Cisco Br. at 13:14-16 (citing *John Wieland*

11   *Homes* and Nimmer). Rather, Arista is arguing that these aspects of Cisco's work *are simply*

12   *unprotectable* because they were never selected and arranged as such outside of this litigation.

13   **F.   Cisco's arguments about its hierarchies fail for all the same reasons as its
                          claims about its commands.**

14   First, Cisco makes the same "Subjective Judgment and Creativity" arguments about its

15   hierarchies as it does about its commands. Cisco Br. at 13–14. They fail for the same reasons

16   explained above. *See supra* Parts II.A-E.

17   Second, Cisco recites the notion that a computer program's structure, sequence and

18   organization may be copyrightable. Cisco Br. at 13. But whether such protection exists depends

19   "on the particular facts of each case." *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*,

20   886 F.2d 1173, 1175 (9th Cir. 1989). In *Johnson Controls*, the Ninth Circuit held, on review of a

21   preliminary injunction, that the district court had not clearly erred in finding on the facts of *that*

22   case that the particular structure, sequence and organization at issue was protected, yet noted that

23   the issue deserved to be "revisited at trial." *Id.* at 1176. On the facts of this case, Cisco has not

24   shown that its asserted hierarchies—its purported "unique sequence in which it organizes its

25   multi-word commands," which the Court held might be copyrightable (*see* Cisco Br. at 13, citing

26   MSJ Order), are even actually a part of its programs' structure in the form asserted here. Cisco

27   makes no real attempt to do so. Instead, Cisco offers Dr. Almeroth's explanation that commands

28   are organized into groups hierarchically, and that "I understand Cisco has asserted various

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1   command hierarchies in this case." Cisco Br. at 14; Ameroth Rpt. (ECF 620-1) ¶ 54. In fact, Dr.

2   Almeroth's Exhibit 5 (ECF 620-10) reveals that the various commands claimed as part of Cisco's

3   hierarchies did not all appear in the same version of its operating systems at the same time.

4   Cisco also argues that it "is not relevant to filtration" whether or not "the hierarchies

5   Arista [allegedly] copied reside within a single registration." Cisco Br. at 14:16–17. But if Cisco

6   seeks to offer to the jury a theory about its copyrighted expression that finds no support in the

7   registered works, then that is precisely the purpose of dissection—to ensure the jury makes a

8   determination of infringement based upon only protectable expression.[11]

9   Cisco also offers no substance to support its claims that its hierarchies contain creative

10   expression separable from their function. Instead, Cisco argues that the hierarchies contain

11   distinct expression from the commands because they "include[] 'the aesthetic of having a . . .

12   symmetric hierarchy' that was 'elegant,'" and because Cisco "could have sub-structured its

13   hierarchies in any number of equally creative ways, each of which would have been

14   independently protectable." Cisco Br. at 14. In addition, Cisco claims it "exhibited creativity and

15   originality in deciding precisely how to convey that a specific set of words [i.e. particular

16   commands] would follow an initial one." *Id.* at 13:25. None of this distinguishes the creativity of

17   the commands from Cisco's attorneys' hierarchical depiction of them. If the idea of organizing

18   commands hierarchically is not protectable (as Cisco concedes), and the organizing command

19   words themselves (*i.e.*, "show," "ip," etc.) are found unprotectable, then the fact that Cisco can

20   organize commands around unoriginal keywords does not add expression. To hold otherwise

21   would grant Cisco copyright in a natural attribute of language and the inherent functionality of the

22   parser software that, like human speech, parses individual words in sequential order.

23   **G.   Arista challenged Cisco's "arrangement" of modes/prompts as unprotectable,**
             offering extensive evidence, and Cisco offers no contrary proof.
24
             Cisco mistakenly claims that "Arista does not challenge that Cisco's particular
25
     arrangement of identified modes and prompts is protectable," but in fact Arista does dispute this.
26

27   [11] Cisco's brief on defining its works purports to offer authority supporting aggregation of
     multiple registered works as the basis for an infringement analysis, but cites no real Ninth Circuit
     authority for this notion, and no case remotely analogous to Cisco's effort to extract a non-literal
28   element (the user interface) from across dozens of distinct operating systems. *See* ECF 633 at 2.

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1   Cisco Br. at 15:11–12. As Arista explained, Cisco's arrangement of modes and prompts "is also

2   not entitled to copyright protection because it is a creature of Cisco's litigation strategy," and is

3   only a small subset of the modes actually included in Cisco's works, with no creativity except for

4   litigation-driven selections. Arista Response re Protectable Elements (ECF 585) at 12:25-28.

5   As with the commands and hierarchies, Cisco also claims again that it is "irrelevant to

6   filtration" whether its asserted selection of modes and prompts is actually the complete selection

7   of modes and prompts in any registered work, or only a subset that Cisco made up for this

8   litigation. Cisco Br. at 15:17-22. But again, if the "selection" Cisco asserts is not protected

9   expression of a registered work, now is the time to identify that failure of Cisco's case.

10   Finally, Cisco claims falsely that Arista has no evidence anyone before Cisco used more

11   than the "general idea of using modes and prompts." Cisco Br. at 15–16. In fact, Arista provided

12   detailed evidence that Privileged and Exec modes and Cisco's prompt symbols were used before

13   Cisco, and used together, and that combination of modes is unprotectable. Arista Br. at 11–12.

14   **H.   Cisco's command responses and help descriptions are unprotectable for the
             same reasons as its commands.**

15
       Cisco's arguments against analytic dissection of its command responses and help

16   descriptions fail for all the same reasons as its arguments about the commands. Cisco offers no

17   evidence or authority to support any different treatment for the command responses or help

18   descriptions, and the jury should be instructed that they are unprotectable to the extent explained

19   in Arista's opening brief. *See* Arista Br. at 12 (responses); *id.* at 12–13 (help descriptions).

20
       **I.   Cisco's manuals are also subject to analytic dissection, and Cisco's arguments
             to the contrary lack merit.**

21
       Cisco admits that its manuals are separate works from its operating systems. *See* Cisco

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23   Br. at 18. However, Cisco appears to claim that analytic dissection does not apply to the manuals

24   because they "are not user interfaces." *Id.* at 18:24–27. This is wrong. Analytic dissection

25   applies to all literary works, not just computer programs or interfaces. *See Shaw v. Lindheim*, 919

26   F.2d 1353, 1356 (9th Cir. 1990) (television scripts; discussing origins of rule and application to

27   literary works). To the extent Cisco's manuals simply reprint facts or other unprotectable

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elements, such as command names, those portions of the manuals are also unprotectable.[12]

III.   Cisco's illogical arguments for "broad" copyright protection fail to rebut Arista's proof that only "thin" protection is warranted.

Cisco claims its interfaces are entitled to "broad" copyright protection because Cisco's "use of text made a 'wide range of expression' available." Cisco Br. at 20:2–3. This makes no sense. The rules of broad and thin protection differentiate between factual/functional and fictional/creative **literary works**. *See Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984); *Feist,* 499 U.S. at 350. All books and text-based works use text and "combinations of words and symbols" (Cisco Br. at 20:5), so Cisco's mere "use of text" does not guarantee broad copyright protection. Cisco offers no evidence to support its contention that its "selection and arrangement of text in a word-based user interface is not 'highly constrained.'" *Id.* at 20:11. In fact, the range of potential expression available to Cisco within the functional context of designing a networking command-line interface was very narrow. *See* Arista Br. at 15–19.

Instead of offering its own evidence about the range of potential expression, or disputing Arista's evidence that the range of potential expression in designing a command-line interface was narrow, Cisco resorts once more to its claims that it could have created an interface "based on graphical symbols or a series of menus" (Cisco Br. at 20:15), or a "Linux-based interface" like Arista's alternative to its command-line interface (*id.* at 20:18-19). This amounts to claiming copyright in the unoriginal idea of a command line interface, under another name. The relevant question is whether a wide or narrow range of possible expression was available for Cisco's choice of implementing the idea of a command-line interface. The question is not whether a wide range of expression would have been available had Cisco chosen other unoriginal interface types such as a graphical interface. Similarly, a doll-maker cannot claim that a broad range of expression existed for the project of creating a fashion doll sculpt because the company could have chosen to create a baby doll instead. *See Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914–15 (9th Cir. 2010) (analyzing available expression for the doll project actually at issue). Cisco offers no authority that actually supports this notion, and it is not the law.

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[12] The snippets of text that Cisco asserts from its manuals are also so trivial that they fail to qualify for protection in any event. *See Ciccone*, 824 F.3d at 878.

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Respectfully submitted,

Dated: November 14, 2016

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